No. 3111

IN THE

United States Circuit Court of Appeals.

FOR THE NINTH CIRCUIT

UNITED STATES GYPSUM COMPANY, a corporation,
Appellant,

vs.

THE MACKEY WALL PLASTER COMPANY, a corporation,
Appellee.

BRIEF FOR APPELLANT.

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....., Clerk.

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STATEMENT OF THE CASE.

The bill of complaint was filed herein by the Mackey Wall Plaster Company, a Montana corporation of Great Falls, Montana, appellee herein, against the United States Gypsum Company, a New Jersey corporation of Chicago, Illinois, appellant herein, for the specific performance of that certain contract of June 15, 1909, made between appellee and appellant, and the extensions thereof made on July 1, 1910, and July 6, 1915, respectively. The agreement of June 15, 1909, some times referred to as the original contract, leased certain premises hereinafter mentioned, to appellant for the term of one year.

The agreement of July 1, 1910, extended the term of the original contract for five years, and the agreement of July 6, 1915, extended the term for one year from July 6, 1915.

The original contract of June 15, 1909, contained an option found in paragraph "Thirteenth" thereof (Rec., 72), whereby appellee granted to appellant the right to purchase, at any time before the expiration of the term mentioned in said contract, all the property and property rights therein described for $50,000, $15,000 thereof to be paid in cash at the time of the execution and delivery of the conveyance, and the balance of $35,000 to be evidenced by promissory notes of appellant, each for the sum of $5,000 payable to appellee one, three, six, nine, twelve, fifteen, eighteen and twenty-one months after date thereof, respectively. It was further provided in the option, that appellee would convey to appellant all of the property and property rights mentioned therein, by a good and sufficient warranty deed, and that appellant should enjoy the same without any disturbance by any person or persons whomsoever. By the option as given, appellee agreed to sell to appellant upon the exercise thereof, (1) a leasehold interest, with mill erected thereon, near Great Falls, Montana. The land belonged to the Great Northern Railway Company, and was held by appellee under a ten-year lease dated June 22, 1908; (2) all gypsum and minerals underlying several acres of land near Riceville, Montana, and a right of way over certain

adjacent lands; and (3) a ninety-nine year lease interest in several acres of land near the premises last mentioned.

The original contract of June 15, 1909, also contained an option by A. D. Mackey and his wife, as owners and holders of all of the capital stock of appellee, to appellant to purchase from the said Mackeys, if appellant should not have elected to purchase said property and property rights, all of the issued shares of the capital stock of appellee for the same price and upon the same terms and conditions as those contained in the option first above mentioned, except that the consideration was to be paid to the said Mackeys. It is not claimed that appellant exercised this option, and it is merely referred to here because mentioned in the bill of complaint.

It was provided in said extension of July 1, 1910, that appellee leased to appellant the real estate and mining property situated near the Village of Riceville and subleased the real estate situated near the City of Great Falls subject to the terms and conditions of said original lease, and that all the rights and privileges granted in and by the agreement of June 15, 1909, were extended and renewed for a term of five years. (Rec., 15-22.) Under the option contained in the original agreement and renewed by the agreement of July 1, 1910, appellant had the right to purchase the property, at any time before the expiration of the term of the lease, without the necessity of giving any notice of its intention to purchase the same.

It was provided in the extension of July 6, 1915 (Rec., 25-26), as follows:

> "Now, THEREFORE, in consideration of the premises * * * it is agreed that the said instruments dated June 15, 1909, and July 1, 1910, be in all things and respects extended, renewed and made valid and of full force and effect for the further period of one (1) year from and after the date hereof. And as a further consideration for said extension lessee agrees that if it shall determine that it will not avail itself of the option in said several agreements contained to purchase the property of the lessor, Mackey Wall Plaster Company, upon the terms and conditions in said several instruments provided, it will at least sixty (60) days prior to the first day of July, 1916, give the lessors in writing a notice to the effect that lessee will not purchase the said property under and by virtue of said agreements; and it is agreed that if lessee shall neglect or fail to give such notice, at least sixty days before the first day of July, 1916, it will thereby become obligated to make such purchase and pay the consideration in said instruments provided to be paid in the event of purchase * * *."

the effect of which was to extend the option to purchase for one year from July 6, 1915, so that the option expired on July 6, 1916, but appellant was required, if it determined not to purchase, to give to appellee sixty days' notice in writing prior to July 1, 1916, of its intention not to purchase said property.

In a letter dated July 14, 1915, addressed to appellant by appellee, it was provided that the notice to be given

under said contract of July 6, 1915, would be sufficient if deposited in the United States mails, postage prepaid, and enclosed in an envelope addressed to either the Mackey Wall Plaster Company, A. D. Mackey or Myra Post Mackey at the City of Great Falls, County of Cascade, State of Montana. (Rec., 28.)

The amended bill of complaint alleged that appellant, having elected not to purchase said premises, failed and neglected to serve notice thereof in writing upon appellee within sixty days prior to May 1, 1916. Appellee proceeded upon the theory, that the failure of appellant to give notice of its intention not to purchase said premises within sixty days prior to May 1, 1916, operated as an election by appellant to purchase, and prayed for specific performance of said contracts and a decree for the purchase price of the properties in question.

Appellant denied in its answer, that it had elected to purchase said premises and alleged that on the contrary thereof it notified appellee by letter dated April 19, 1916 (Rec., 94-95), of its intention not to purchase, more than sixty days prior to May 1, 1916, in words and figures as follows:

> "On May 5th our option to purchase your mill property at Great Falls expires.
>
> I am writing you in advance of that date to inform you that conditions in Montana at this time are such that it will be necessary for us to cancel our arrangement with you at the time of its expiration, which is July 5th.

> We have had men looking for gypsum almost constantly since our last meeting, and so far our efforts have been fruitless.
>
> If you care to come down and talk the matter over we will be glad to have you do so.
>
> Expect to give you formal notice on May 5th that we do not care to purchase your property'';

which letter was received on or about the date thereof by A. D. Mackey, the president and general manager of appellee. Appellant further answered that appellee, following the receipt of the letter of April 19, and on or about April 28, 1916, was informed at a conference had in Chicago, Illinois, between the said A. D. Mackey and O. M. Knode, manager of operations of appellant, that appellant would not purchase said premises; that the notice so given to the said Mackey was accepted by him, and appellee and appellant through their said agents then and there entered into negotiations for a new lease. (Rec., 41-48.)

Although it must be conceded by appellee, that it received actual notice of the unwillingness of appellant to purchase the properties mentioned in the option, it contended that appellant failed to give notice in writing as provided in said extension of July 6, 1915. The basis of appellee's whole claim was founded upon the technical position, that appellant failed to give notice in writing of its determination not to purchase the property. Appellant contended that the letter of April 19, 1916, was sufficient notice, and that there could be no doubt of its meaning after the conference of April 28, 1916, whereat

appellee was informed of the intention of appellant not to purchase the properties.

Appellant further alleged in its answer, that at the conference of April 28, 1916, between Mackey and Knode, appellee by accepting the notice of intention not to purchase and entering into negotiations for a new lease, waived any necessity that there may have been for any further notice, and estopped itself from claiming that the notice as given was insufficient. This allegation of the answer, as we view the record, was fully sustained by the evidence. When the conference ended, it was fully understood, that appellant would send a written proposition for a new lease to appellee at Great Falls. Letters of introduction to the superintendent at the mine were dictated and mailed to Mackey at Minneapolis, for the purpose of enabling him to visit the mines at Great Falls, and pass upon the proposition of appellant. At the same time a letter was sent to the superintendent, which, according to the testimony of two witnesses, was dictated in Mackey's presence (Rec., 132) and in which it was said:

> "Mr. A. D. Mackey, owner of the property at Great Falls and Riceville, will visit you in the course of the next week or ten days, with a view to looking over the property to determine what course of action he will take and whether or not he will renew the lease with us.
>
> The time expires on the 5th day of July. At this time if the lease is not renewed we will withdraw from the property."

On May 11th, about the time appellant expected Mackey would be in Great Falls, it sent a letter to him containing a proposition for a new lease. In, that letter appellant reviewed what had transpired on and before April 28th, and closed by proposing an extension of the lease for a year, or for an indefinite term, subject to cancellation upon sixty days' notice. (Rec., 136.)

Mackey went to Great Falls during the early part of May, but did not visit the mine. On the contrary, he served notice upon appellant, that because it had failed to notify him in writing of its unwillingness to purchase the property it had thereby elected to purchase the same.

It was further alleged in the answer of appellant that appellee was not the owner in fee simple of all of the properties described in said contracts, and that it was unable to convey a good title to said premises free and clear of all encumbrances, and that it was unable to convey and transfer to appellant the premises described in said amended bill of complaint. In the lease between appellee and the Great Northern Railway Company it was provided, that the same could not be assigned without the written consent of the Railway Company. Appellant claimed, that the contract in this case could not be specifically enforced because the court could not compel the execution of the written consent by the Great Northern Railway Company. The contract therefore lacked mutuality of remedy. It also claimed, that appellee could not maintain its action without having first ob-

tained the written consent of the Railway Company to an assignment of said lease.

The cause was tried submitted to the court and taken under advisement, and appellee closed its case without offering any evidence of consent on the part of the Great Northern Railway Company to an assignment of the lease. On July 27, 1917, a few months after the cause was tried, the court rendered an opinion holding, that the letter of April 19, 1916, was not sufficient notice of the determination of appellant not to purchase; that the contract could be specifically enforced in equity; but finding that no decree for specific performance could be rendered until appellee produced the written consent of the Great Northern Railway to the assignment of the lease aforesaid. In its opinion the court concluded with the words (Rec., 207):

> "If within thirty days plaintiff secures the railway lessor's consent to the assignment, or a discharge of the covenant, and in all else is ready to perform, it shall have decree as prayed. Otherwise decree for defendant."

At subsequent proceedings had in said cause and without entering any order reopening said cause, appellee was permitted to introduce in evidence a paper purporting to be the written consent of the Great Northern Railway Company (Rec., 177), which paper bore no date and no seal of the Great Northern Railway Company and was signed, "Great Northern Railway Company by R. I. Farrington, its second vice president." Appellee was also

permitted to take depositions to prove that said paper was signed by one R. I. Farrington when he was acting as second vice president of the Great Northern Railway Company. The deposition of Robert I. Farrington showed, that he served as a vice president of the Great Northern Railway Company until December 31, 1912, but did not show on what date the said purported consent was signed by him. (Rec., 185-186.) The deposition of L. E. Katzenbach was received to prove the authority of a vice president to execute such an instrument during the time Farrington acted as such. His evidence, however, showed, that he had been secretary of the Great Northern Railway Company since 1912 and that he had no personal knowledge of the records mentioned by him in his deposition, prior to the date of his employment. (Rec., 192.) The deposition of R. J. Reynolds was received to show that he was a clerk in the legal department of the Great Northern Railway Company in the office of Veazie & Veazie at Great Falls in the months of May and June, 1909, and that he received the foregoing consent in the mail from the office of the Great Northern Railway Company at St. Paul, Minnesota, signed by Mr. Farrington. (Rec., 193-196.) The deposition of W. H. Hoover was taken to show, that he received the said purported consent from I. Parker Veazie, Jr., one of the members of the firm of Veazie & Veazie, and to show delivery of the consent in the following manner:

> "He produced from the file and handed to me the consent, Plaintiff's Exhibit 'A,' which is attached

> to Mr. Farrington's deposition, and stated that the consent had been given long prior to this time for the purpose of being delivered to the Mackey Wall Plaster Company and that he would then deliver it." (Rec., 198.)

There was no competent evidence of delivery of the consent by the Railroad Company to appellee, or to appellant.

It was contended by appellant, that the said depositions were taken and received in violation of Federal Equity Rule 47; that the evidence was incompetent and not binding upon the Great Northern Railway Company or appellant; and that proof of the delivery of said instrument by Mr. Veazie to Mr. Hoover, at a time long after the witness Farrington ceased to be a vice president of the Railway Company, did not constitute a delivery of said consent by the Railway Company.

The court upon such evidence entered a final decree, decreeing that appellant pay to appellee the sum of $15,000 with interest at 6 per cent. per annum from July 6, 1916, and execute and deliver to appellee its seven promissory notes for $5,000 each, dated July 6, 1916, with interest at 5 per cent. per annum from date thereof. Appellant objected to the assessment of interest on the ground that it was improper to award interest on said amounts from July 6, 1916, when the record showed and the court found, that appellee was not entitled to a decree before it procured the written consent of the Great Northern Railway Company, above mentioned.

The contract contemplated that no payments were to be made by appellant, until appellee made the conveyance of the premises in accordance with the terms of the agreement.

Specification of Errors.

1.

The court erred in failing to hold that the complainant received from the defendant sufficient notice of the intention of the defendant not to purchase the properties of the Mackey Wall Plaster Company under the contracts of June 15, 1909, July 1, 1910, and July 6, 1915, respectively.

2.

The court erred in failing to hold that the letter of April 19, 1916, from defendant to complainant was sufficient notice to complainant of the intention of the United States Gypsum Company not to purchase the property of the Mackey Wall Plaster Company.

3.

The court erred in failing to hold that complainant, The Mackey Wall Plaster Company, waived notice of the intention of the United States Gypsum Company not to purchase the properties of the Mackey Wall Plaster Company, as required by the contract of July 6, 1915.

4.

The court erred in failing to hold that the complainant, the Mackey Wall Plaster Company, estopped itself from claiming, that it did not receive sufficient notice of the intention of the United States Gypsum Company not to purchase the properties of the Mackey Wall Plaster Company, as required by the contract of July 6, 1915.

5.

The court erred in failing to hold that the contract of June 15, 1909, and the extensions thereof on July 1, 1910, and July 6, 1915, respectively, could not be specifically enforced in equity at the suit of either the plaintiff or the defendant, and that said contracts were of such a nature, that they could not be specifically enforced in equity.

6.

The court erred in failing to hold that before complainant could maintain its cause of action against the defendant, it was necessary for the complainant to procure and deliver to the defendant the written consent of the Great Northern Railway Company to an assignment of the lease of June 22, 1908, to the United States Gypsum Company.

7.

The court erred in holding that complainant could procure said consent after the trial of said cause, and if it procured the same or a discharge of the covenant con-

tained in said lease requiring such written consent, within thirty (30) days after the opinion was filed in said cause, the decree therein should be as prayed in complainant's said bill of complaint.

8.

The court erred in making order permitting taking of depositions of Robert I. Farrington and L. E. Katzenbach.

9.

The court erred in making order of September 4, 1917, for a further hearing at Missoula on October 3, 1917, for the taking of further testimony.

10.

The court erred in overruling motion of defendant to suppress depositions of said Katzenbach and Farrington and in admitting their depositions herein.

11.

The court erred in overruling objections of defendant to a question propounded to Robert I. Farrington as follows: "As such officer was it a part of your duties to sign contracts and instruments affecting the title to the real property and right of way of the Railway Company?"

12.

The court erred in overruling objections of defendant to the following question set forth in the deposition of L. E. Katzenbach, to wit: "Read the part with reference to the election of Mr. Farrington."

13.

The court erred in holding that the consent procured by the complainant and filed herein was the written consent duly given by the Great Northern Railway Company and made and delivered by it as a consent to an assignment of said lease to the United States Gypsum Company.

14.

The court erred in receiving the instrument filed by the complainant herein and purporting to be the consent of the said Great Northern Railway Company to an assignment of said lease.

15.

The court erred in granting the motion of the complainant made herein on September 4, 1917, to enter a decree for complainant, based upon the presentation by the complainant of the said instrument purporting to be the consent of the Great Northern Railway Company to an assignment of said lease of June 22, 1908, to the United States Gypsum Company, and in denying the motion of the defendant made herein on September 4, 1917, to enter a decree for said defendant.

16.

The court erred in allowing to the complainant by its final decree in said cause interest on the sum of fifteen thousand dollars ($15,000) at eight per cent. (8%) per annum from July 6, 1916, and in allowing interest to said complainant by its final decree at five per cent. (5%) per annum from July 6, 1916, upon the promissory notes mentioned in said decree.

17.

The court erred in providing in said decree that defendant pay the complainant the sum of money therein mentioned and execute the promissory notes therein described upon complainant executing a proper conveyance and delivering the written consent of the Great Northern Railway Company to the assignment of the lease of June 22, 1908, to the United States Gypsum Company.

18.

The court erred in entering its final decree in said cause in favor of the said complainant.

19.

The court erred in failing to enter a decree in said cause for the defendant, and in failing to dismiss the said bill of complaint for want of equity.

ARGUMENT.

I.

APPELLEE, BY THE LETTER OF APRIL 19, 1916, RECEIVED NOTICE OF THE INTENTION OF APPELLANT NOT TO PURCHASE THE PROPERTIES DESCRIBED IN THE CONTRACT OF JUNE 15, 1909, AND BY ENTERING INTO NEGOTIATION FOR A NEW LEASE, WAIVED ANY FURTHER NOTICE.

By the terms of the original contract of June 15, 1909, appellant had the privlege of buying appellee's property at any time before the expiration of the lease, or any extension thereof. (Rec., 72-75.) When the supplemental agreement of July 6, 1915, was made it was provided, that the instruments of June 15, 1909, and July 1, 1910, the latter being an extension of the original contract, were in all things and respects extended, renewed and made valid and of full force and effect for the further period of one year from and after the date thereof. (Rec., 25.) The option was thereby extended to July 6, 1916, subject only to the condition, that if appellant determined not to purchase, it would give notice thereof in writing to appellee sixty days prior to July 1, 1916. (Rec., 25-26.)

The option to purchase, as shown, did not expire until July 6, 1916, and the only object or purpose of any notice was to advise the vendor of the fact, that the vendee had determined not to purchase, in case it so determined, before the option expired. Under these circumstances any

notice by appellant to appellee which made known to the latter the determination of the former not to purchase, was sufficient notice under the supplemental agreement of July 6, 1915.

On April 19, 1916, appellant's manager of operations addressed a letter to A. D. Mackey, the president and general manager of appellee, at Minneapolis, Minnesota (Rec., 94), wherein it was said:

> "On May 5th our option to purchase your mill property at Great Falls expires.
>
> I am writing you in advance of that date to inform you that conditions in Montana at this time are such that it will be necessary for us to cancel our arrangement with you at the time of its expiration, which is July 5th.
>
> We have had men looking for gypsum almost constantly since our last meeting and so far our efforts have been fruitless.
>
> If you care to come down and talk the matter over we will be glad to have you do so.
>
> Expect to give you formal notice on May 5th that we do not care to purchase your property."

A few days thereafter, and on April 28, 1916, at a conference in Chicago, A. D. Mackey, president and general manager of appellee, and O. M. Knode and John H. Nold, manager of operations and general superintendent, respectively, of appellant, discussed the question of the unwillingness of appellant to purchase the properties of appellee (Rec., 110, 126-131, 155-165), and at a time when it was fully understood by appellee, that appellant had

determined not to purchase, entered into negotiations for a new lease. (Rec., 113-114, 128-134, 158, 162, 163.) It is our contention on behalf of appellant that, (a) the letter of April 19th informed appellee of the determination of appellant not to purchase the properties under the option; and (b) if there was any question of the sufficiency of the letter of April 19th to serve the purpose claimed for it by us, the conduct of appellee's president and general manager at the meeting of April 28th, waived the necessity for any further notice, and estopped appellee from claiming that the notice as given, was not sufficient.

Mr. Knode testified that, upon Mackey's arrival on April 28, 1916, he explained to Mackey the reason why the United States Gypsum Company had decided not to purchase the property of the Mackey Wall Plaster Company, following which an extended discussion was had among Mackey, Knode and Nold concerning the physical condition of the properties, and the inability of appellant to procure gypsum therefrom. (Rec., 133, 155.) All present at that meeting, including Mr. Mackey, testified that it was stated by Mr. Knode, that appellant would not purchase the properties of appellee. (Rec., 110-111, 133, 155.) The question of a new lease was then discussed, and it was arranged, that Knode would write to Mackey at Great Falls, stating the terms upon which appellant would continue the lease.

Knode said Mackey asked him, "Well, what will you do, what can you do?", in reply to which Knode said, that there was only one thing they were willing to do, and that was to continue the lease for an indefinite period on terms that would allow them to retire from the property whenever the gypsum became exhausted. Mackey inquired what he meant by that, and Knode replied that it would have to be a short-term lease or a lease for a year subject to cancellation upon thirty days' notice. (Rec., 128-130, 133-134.) Mackey then requested Knode to write him the proposition as outlined, saying that he would return to Minneapolis and later go to Great Falls, to which Knode said he would write him at Great Falls. (Rec., 134.) The testimony of Mr. Knode was corroborated by the testimony of Mr. Nold. (Rec., 155-165.) On May 11th, and before Mackey claimed, that appellant had purchased the properties, Knode wrote him (Rec., 136) reviewing the things which transpired on and before April 28th, and containing a proposition to continue the lease as follows:

> "With further reference to our conversation regarding your property at Great Falls and Riceville, Montana, we wish to say that in view of the difficulties connected with the mining operation at Riceville and other conditions which have entered into the situation since our renewal of the contract last July, we are unwilling to purchase the said property mentioned in said agreements under the terms contained therein.
>
> We are willing, however, to enter into an extension of these contracts, whereby all of the provisions

thereof are extended for an indefinite term, or, if you prefer, the contract can be extended for the term of one year subject to cancellation upon sixty days' written notice given by us to you of our intentions to terminate the same, rental to be payable monthly in advance, instead of yearly as heretofore." (Rec., 136.)

Mr. Mackey admitted the facts substantially as they were stated by Knode. He said:

"When I was in Mr. Knode's office in Chicago he told me that the defendant would not purchase my property, and further stated that he would send me a formal notice on May 4th, or May 5th, * * * that we do not desire to purchase your property. I answered. I said, 'Well, whatever your company decides to do, you may send to me, care of Mr. Ransom Cooper.' * * * (Rec., 110-111.) When I was in Chicago I talked with Mr. Knode and Mr. Nold concerning the making of a new lease. When I went back * * * he said, 'Well, if it met with his company's approbation he would favor a continuing of the lease, their taking their rent monthly in advance, they to give ninety days' notice in case they wished to surrender the property.' In response to this statement of Mr. Knode I said, 'Well, you put in writing what you folks have in mind and send it to Mr. Cooper.' * * * After lunch was this other matter of his proposal that he would like to continue the lease. I said, 'Put in writing whatever you folks have in your mind and send it to Mr. Cooper,' and he wanted to know if I would answer promptly. I answered him we would. (Rec., 113-114.) * * * When we were discussing the making of a new lease I had no means of knowing what they

had in mind. I was in the dark. They had a right to send that notice and they had a right not to. It was not a fact that when I left the office of the Gypsum Company I was aware the defendant had decided not to buy my property, if that had been their position. I know just a little about business and know that the thing then for them to have done was to have written out that formal notice and handed it to me and taken a receipt for it at the time. (Rec., 116-117.) * * * Mr. Knode stated to me in Chicago that if the company would acquiesce in his idea he would favor continuing the lease subject to cancellation on ninety days' notice. I said to him, 'Whatever your company decides to do in the matter, put in writing and send it out.'" (Rec., 119.)

Although Mackey repeatedly said, that he did not know when he left Chicago that appellant had decided not to purchase the properties, his own evidence of what was actually said, showed the contrary.

At the conference above mentioned, according to the testimony of Knode and Nold, two letters were dictated to the superintendent at Great Falls, one to be given to Mr. Mackey introducing him to the superintendent, and the other to the superintendent advising him of the expected visit of Mr. Mackey. (Rec., 130, 162.) These letters were dictated at the end of the conference, and, as explained by Mr. Knode, were written up and mailed the next day and therefore bear date April 29th. This was corroborated by the letter of April 29, 1916, addressed to Mr. Mackey (Rec., 131), in which the letter introducing him to the

superintendent was enclosed. In the letter of April 29th (Rec., 132) written in the presence of Mr. Mackey, and at a time when no dispute had arisen between the parties, the following is found:

> "Mr. A. D. Mackey, owner of the property at Great Falls and Riceville, will visit you in the course of the next week or ten days, with a view to looking over the property to determine what course of action he will take and whether or not he will renew the lease with us. The time expires on the 5th day of July. At this time, if the lease is not renewed, we will withdraw from the property."

It is difficult to understand how Knode could dictate such a letter if it did not contain in substance the negotiations had at the conference of April 28, 1916. Mackey denied that the letter was written in his presence (Rec., 115) and said (Rec., 103):

> "On my way to the hotel I thought of one thing I had forgot so when I got to the hotel I rung up Mr. Knode and said I had forgot to ask for the customary letter of permit to look at the mill and the mine, and Knode said he would send it and include Mr. Cooper's name in the permit."

Mackey also said, for the purpose of bolstering up his denial, that he remembered the fact, because he used a new nickel phone arrangement, and, that he was surprised when he received the letter in Minneapolis the next day as he expected to receive it in Great Falls. (Rec., 114.) But he had already testified on direct examination, that Knode said he would mail it to him at Minneapolis (Rec., 103), nor could he

have received the letters upon his arrival in Minneapolis the next day as they were dated and mailed Saturday, April 29th, and could not have been received at his address through the mails before Monday, May 1st. Mackey's recollection of the incident of running across a new telephone arrangement, and his recollection of surprise, where none could have occurred, was merely an effort to avoid the effect of the statements contained in the letters of April 29th, dictated in his presence. The evidence also shows, that Knode left his office immediately following Mackey's departure (Rec., 135, 164), and it would have been impossible for him to have received any such telephone communication, as outlined by Mackey.

In other respects the testimony of the three witnesses substantially agreed as to what took place at the meeting of April 28, 1916, except that Mackey claimed that on one occasion, when Nold was not in the room, Knode made the statement to him that he would send on May 4th or 5th a formal notice of intention not to purchase. (Rec., 111.) Both Mr. Knode and Mr. Nold denied that any such statement was made, and Mr. Nold further testified that he was in the room during the entire conversation. (Rec., 164.) If the parties agreed, as the evidence of all three witnesses showed, that appellant would send the proposition for a new lease to Great Falls, it was not likely, that Knode said he would send the formal notice not to purchase.

Mackey intended to return to Minneapolis before going

to Great Falls, and any notice sent to him in Great Falls obviously could not have been received by him within sixty days prior to July 1st, as stated in the lease. The last day for any such notice was May 1, 1916, two days following the conference. If Mackey's view of it is accepted, he was in the position of standing by and negotiating for a new lease with knowledge, as admitted by him, that the Gypsum Company would not purchase, he intending not to treat the negotiations seriously because the Gypsum Company had told him that notice would go out on the 4th or 5th of May, at a time too late to accomplish its purpose. Should Mackey be permitted in this court to take advantage of such an intention on his part?

It has frequently been held that mere informality does not vitiate a notice and that no particular form of notice is necessary. The notice is sufficient if it gives the necessary information to the proper parties. It was so held in the following cases:

2 Tiffany on Landlord & Tenant, 1443.

Wiener v. *H. Graff & Co.*, 95 Pac. (Cal. Ct. App.), 167, 169.

Coy v. *Title Guarantee & Trust Co.*, 198 Fed., 275, 281.

Tooele Meat & Storage Co. v. *Morse*, 136 Pac. (Sup. Ct. Utah), 965, 966.

Black v. *The Chicago & N. W. Ry. Co.*, 18 Wis., 219.

Westenhaver v. *German Amer. Ins. Co.,* 84 N. W. (Sup. Ct. of Ia.), 717.
Lyon v. *Pollard,* 87 U. S., 403.
29 Cyc., 1117.
39 Cyc., 1386.

Since the only purpose of the notice was to aquaint appellee of the determination of appellant not to purchase, sixty days before the option expired by its terms, it seems to us that any writing showing that appellant had determined not to purchase was sufficient. If there was any doubt as to the meaning of the notice of April 19, 1916, when it was received, could there be any question of the intention of the United States Gypsum Company, as therein expressed, after the conference of April 28, 1916? There, Mackey was expressly informed of its meaning, and the letter dictated in his presence to the superintendent stated, that unless the lease was renewed appellant would withdraw from the properties. The notice as given was sufficient to advise appellee, that appellant had determined not to purchase before the option by its express terms expired. To hold otherwise would be to penalize appellant for mere failure to give a more formal notice of its intention not to buy, in a case where the privilege to buy had not expired.

We are confident, that upon a record such as this, even if the notice of April 19th, standing alone, should not be regarded as sufficient, the parties waived

the necessity of giving any further notice after the conference of April 28th, and Mackey by his conduct estopped himself from asserting, that he was entitled to any further notice. But suppose for a moment we accept appellee's own theory of the case. It had notice in fact, that appellant would not purchase, but claimed it was entitled to a more formal notice. Mackey, according to his view of it, requested appellee to send the formal written notice, and the proposition for a new lease, to Great Falls, at a time when, if sent, they could not have been received by him until after May 1st, the date fixed in the contract for such notice. The purpose of the notice had already been accomplished, and Mackey did not intend to reach Great Falls until some time after the 1st of May. Would not appellant, under these circumstances, have had a reasonable time within which to send the formal notice, and the proposition for a new lease? The letter of May 11th, sent by appellant about the time Mackey reached Great Falls (Rec., 112) contained the statement that appellant would not purchase, but would lease the properties for a further term.

Appellee did not treat the time for giving such formal notice as of the essence of the contract, when it was satisfied to leave the matter with appellant as it did on April 28th. Upon appellee's theory, the time for giving the formal notice was not treated as material, nor should it be so treated in a court of equity. It is in fact, a

general rule, that time is not considered by courts of equity as of the essence of the contract.

If the parties treated the notice of April 19, 1916 as sufficient, and appellee accepted the statement of appellant at the conference of April 28, 1916 that it had determined not to purchase, and negotiations were then made for a new lease, did not appellee thereby waive the necessity for a further notice and estop itself from saying that any further notice was necessary? Appellant relied upon appellee's conduct, and believed that the matter had resolved itself into negotiations for a new lease. Mackey obtained the letter of introduction to the superintendent at Great Falls and led appellant to believe, that he would examine the properties and answer their proposition for a continuation of the lease. According to his own evidence, he never gave the proposition of appellant any further consideration, nor did he visit the properties in pursuance of his letters of introduction. On the contrary thereof, he wrote his letter of May 12th claiming that the United States Gypsum Company had elected to purchase the property. Mackey, according to the arrangement made in Chicago, did not expect to receive anything further from appellant, except the letters of introduction, until he reached Great Falls. He did not intend to, and in fact could not, reach Great Falls until after May 1st, at a time too late for him to receive from appellant any further notice of intention not to purchase sixty days prior to July 1, 1916. He was to receive in Great Falls and consider, after an examination of the properties, the

proposition of appellant for a new lease, a thing wholly inconsistent with the theory of a purchase of the property by appellant. It follows that appellant relied upon appellee's statement, that it would consider the proposition for a new lease, and under these circumstances no further notice of intention not to purchase could have been intended or was necessary.

In 16 Cyc., 805, quoting from *Bigelow on Estoppel,* 603, it was said:

> "While waiver is not in the proper sense of the term a species of estoppel, yet where a party to a transaction induces another to act upon the reasonable belief that he has waived or will waive certain rights, remedies or objections, which he is entitled to assert, he will be estopped to insist upon such rights, remedies or objections to the prejudice of the one misled."

In *Dickerson* v. *Colgrove,* 100 U. S., 578, 580, the court in discussing the doctrine of estoppel *in pais* said:

> "The law upon the subject is well settled. The vital principle is, that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice. It is available only for protection and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man and is not permitted to go beyond this limit."

On the question of inconsistent positions, the general rule is stated in 16 Cyc., 785; that where a person has with knowledge of the fact acted or conducted himself in a particular manner or asserted a particular claim, title or right, he cannot afterwards assume a position inconsistent with such act, claim or conduct, to the prejudice of another. It is upon this principle, that the person is said to be estopped of taking advantage of his own fraud or wrong. And in the same work at page 791 it was said, that where a person, with actual or constructive knowledge of the facts, induces another by his words or conduct to believe that he acquiesces in, or that he will offer no opposition thereto, that the other in reliance on such belief alters his position, such person is estopped from repudiating the transaction to the other's prejudice.

In *Insurance Co.* v. *Norton,* 96 U. S., 234, 243, this language was quoted with approval:

> "After a forfeiture of a license to gather minerals off a manor had been incurred, the landlord entered into negotiations with the licensee and his son to grant to the latter a renewal of the license when it should expire, and terms were agreed upon which the landlord afterwards refused to carry out. It was held that by entering into these negotiations he waived the forfeiture of the original license. The negotiations assumed that the original license was to continue to its termination."

And in *Casey* v. *Galli,* 94 U. S., 673, 680, it was said:

> "Parties must take the consequences of the posi-

> tion they assume. They are estopped to deny the reality of the state of things which they have made appear to exist and upon which others have been led to rely. Sound ethics require that the apparent in its effects and consequences should be as if it were real, and the law properly so regards it."

The same principle is found in many other cases, among them being:

McClelland v. *Rush,* 24 Atl. (Sup. Ct. Pa.), 354.
Long, Admr. v. *Stafford,* 8 N. E. (N. Y.), 522.
Southern Ry. Co. v. *People,* 228 Fed., 853.
Sheppard v. *Rosenkrans,* 85 N. W. (Wis.), 199.
Domestic Bldg. Assn. v. *Guadiano,* 195 Ill., 222; 63 N. E., 98.

The record of Mackey's own testimony shows that his purpose in going to Great Falls was to consider the proposition for a new lease. Why did he request and receive an introduction to the superintendent at Great Falls for the purpose of inspecting the mine, if it was not to enable him to give further consideration to appellant's offer? All of the witnesses agree that the offer was made and considered at the meeting in Chicago and left for further negotiations to be taken up after Mackey reached Great Falls.

II.

THE CONTRACT, COULD NOT BE SPECIFICALLY ENFORCED IN EQUITY AT THE SUIT OF APPELLANT, AND APPELLEE THEREFORE WAS NOT ENTITLED TO SPECIFIC PERFORMANCE BECAUSE OF LACK OF MUTUALITY OF REMEDY UNDER THE CONTRACT.

It is a general rule of law that if a contract for any reason is incapable of being enforced against one party to it, that such party is equally incapable of enforcing it specifically against the other though its execution at the suit of the latter might be free from the difficulty attending its execution at the suit of the former. If appellant could not ask specific performance of the contract in question, against appellee, the latter cannot ask that the contract be specifically enforced against appellant.

By the terms of the contract of June 15, 1909, appellee agreed to convey to appellant that certain leasehold interest acquired by appellee from the Great Northern Railway Company on June 22, 1908. (Rec., 62.) The said lease contained a provision against assignment without the consent of the lessor (Rec., 82), as follows:

> "The lessee shall not and will not assign this indenture nor permit any other person or corporation to use or occupy any part of the premises hereby demised without first having obtained the written consent of the lessor, its successors or assigns thereto."

If appellant, under the contract of June 15, 1909, had elected to buy the property therein mentioned, and had tendered the purchase price to appellee and the latter

had refused to convey the property in accordance with the terms of the contract, could the court at the suit of appellant specifically enforce the contract against appellee? This question is to be determined by the terms of the contract, and if answered in the negative, then it follows that the bill of complaint to specifically enforce the contract in this case must be dismissed.

It is clear that a court of equity could not compel the Mackey Wall Plaster Company to obtain the written consent of the Great Northern Railway Company consenting to the assignment of the lease of June 22, 1908, to the United States Gypsum Company; nor could the court decree that the Great Northern Railway Company give such consent. The Great Northern Railway Company was not a party to the contract of June 15, 1909, and the court would have no jurisdiction to require it to do anything concerning said leasehold interest in an action between the United States Gypsum Company and the Mackey Wall Plaster Company. Upon such a record the courts have held, that a bill for specific performance will not lie.

In *Marble Co.* v. *Ripley,* 77 U. S., 339, 359, Mr. Justice Strong in delivering the opinion of the court, on the question of mutuality said:

> "And it is a general principle that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its

execution in the latter way might in itself be free from the difficulty attending its execution in the former."

We also call the court's attention to *Norris* v. *Fox,* 45 Fed., 406, 407, wherein the same rule was adopted. In that case at the time a contract was executed to convey title to certain Kansas land, the title to the land was not in the contracting party. Norris, who agreed to convey the land, subsequently obtained a deed from Robins and wife to Fox, but the latter refused to accept the same or comply with the contract, whereupon a bill for specific performance was filed. The court said:

"Specific performance cannot be enforced in this instance for want of mutuality in the contract, so far as the remedy for its enforcement is concerned. The rule is fundamental that a contract will not be specifically enforced unless it is obligatory on both parties, nor unless both parties at the time it is executed have the right to resort to equity for its specific enforcement. *Marble Co.* v. *Ripley,* 10 Wall. 340; *Bodine* v. *Glading,* 21 Pa. St. 50; *Duvall* v. *Myers,* 2 Md. Ch. 401; *German* v. *Machin,* 6 Paige 288; *Boucher* v. *Vanbuskirk,* 2 A. K. Marsh, 345; *Duff* v. *Hopkins,* 33 Fed. Rep. 599-608. And where a contract when executed is not specifically enforceable against one of the parties, he cannot, by subsequent performance of those conditions that could not be specifically enforced, put himself in a position to demand specific enforcement against the other party. *Hope* v. *Hope,* 8 DeGex, M. & G. 731-736; Fry, Spec. Perf. (3d Ed., Amer. Notes), § 443. In the case at bar the agreement of Norris to procure a warranty deed of land at the time belonging to another, was of that nature

that only an action at law would lie for a breach of the agreement. As Fox could not compel specific performance of the contract when made, and only had his remedy at law by a suit for damages, the complainant must resort to the same remedy."

At the time the contract was to be performed in that case Norris had in fact procured a deed of the property to the other contracting party. The court, however, held that he could not by such act create the right to specifically enforce the contract when the contract as made was subject to the objection, that it could not be mutually enforced.

In *Stanton* v. *Singleton,* 126 Cal., 657, 59 Pac., 146, 147, 148, an action was brought to compel the specific performance of a contract. It was said:

"In our opinion, the contract is one which does not allow a mutuality of the remedy of a decree of specific performance, and is not, in its nature, a contract which a court of equity would undertake to enforce specifically at the suit of respondents; and it is settled law that a contract will not be specifically enforced unless its character be such that either party to it could have it specifically enforced as against the other. *Cooper* v. *Pena,* 21 Cal. 404, and cases there cited; *Wakeham* v. *Barker,* 82 Cal. 46, 22 Pac. 1131; *Anson* v. *Townsend,* 73 Cal. 418, 15 Pac. 49; *King* v. *Gildersleeve,* 79 Cal. 504, 21 Pac. 961; *Banbury* v. *Arnold,* 91 Cal. 608, 27 Pac. 934; Pom. Cont. (2d Ed.) § 162. In *Cooper* v. *Pena, supra,* the court states the principle in this language: 'The remedy must be mutual as well as the obligation, and, where the contract is of such a nature that it can-

not be specifically enforced as to one of the parties, equity will not enforce it against the other.' Therefore, waiving all other questions, if the obligations of appellant as a party to the contract (assuming that he incurred any) are not such as would be specifically enforced by a court of equity at the suit of respondents, then, under the principle and authorities above stated and referred to, this action cannot be maintained. And it is quite clear that his obligations were of that character.

Appellant contends that *Cooper* v. *Pena, supra,* which is a leading case on the general subject, and has been frequently cited, should not be taken as authority here, because the obligation of plaintiff there was for expressly designated personal services. But *Cooper* v. *Pena* is cited mainly to the point that there must be 'a mutulity of remedy'; and, if there be not such mutuality,—no matter from what cause,—the principle declared in that case applies.''

In *Pacific Electric Ry. Co.* v. *Campbell-Johnson, et al.,* 153 Cal., 106, 94 Pac., 623, 625, 626, the court said:

''If the court was right in holding that the plaintiff was not entitled to such specific performance for lack of mutuality of remedy under the contract sued on, that is the end of the action as far as this appeal is concerned, and we think the ruling of the court below in sustaining the demurrer on that ground was correct.

It is well settled general doctrine that specific performance of a contract at the instance of one of the parties to it will not be enforced in equity, unless the contract is of such obligatory nature upon both parties that, at the suit of either against the other, the court would decree specific performance. * * *

> The remedy of specific performance must be mutual, and the test of mutuality of remedy is applied by considering whether the agreement under which the remedy is asserted is of such a character that, at the suit of either, a court of equity would decree specific performance against the other. In applying this test, if it appears that the right to this remedy is not reciprocal, it is not available to either party to the contract. When there is no such mutuality of remedy equity refuses to interfere, and leaves the parties to assert their rights under the contract in a court of law. * * *
>
> And reiterating and sustaining the doctrine of *Cooper* v. *Pena* in its application to different contracts where specific performance was sought, but denied for want of mutuality of remedy, are *Anson* v. *Townsend,* 73 Cal. 418, 15 Pac. 49; *Stanton* v. *Singleton,* 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334; *Los Angeles, etc. Co.* v. *Occidental Oil Co.,* 144 Cal. 533, 78 Pac. 25."

In *Ten Eyck* v. *Manning,* 27 Atl. (N. J.), 900, 901, the parties entered into a written contract by which complainant agreed to convey to defendant certain lands, and the defendant agreed to convey to complainant a farm and assign to him certain goods and chattels. At the time the contract was made complainant's wife was the owner of the land which he agreed to convey. The defendant refused to perform the contract and complainant sought to compel specific performance thereof. The court said:

> "Of the many defenses set up, only one need be considered, and that is that the contract which the complainant asks to have enforced does not give to the defendant a right to the same remedy against

the complainant which the complainant seeks against the defendant; in other words, that this court could not, on the defendant's application, compel the complainant to specifically perform the contract. The remedy by specific performance is not a matter of strict right, but of sound judicial discretion, and will be granted or denied, as the justice and right of the particular case shall seem to the court, on full consideration of the rights and equities of the parties, to require. The enforcement or denial of this remedy is regulated by certain well established principles, one of which is that it will not be granted, as general rule, in cases where mutuality of obligation and remedy does not exist; or, stated in another form, mutuality of remedy is essential to the maintenance of a suit for specific performance. * * * The precise question raised here has already been decided. *Luse* v. *Deitz,* 46 Iowa 205, is in all material respects precisely like the case under consideration. There, as here, a husband agreed to exchange land belonging to his wife for land of the defendant, and there, as here, the defendant, on tender of a deed executed by the husband and the wife, refused to make a conveyance to the husband, and the husband then brought an action for specific performance. Relief was denied on the ground that the right to the remedy sought was not reciprocal. The court, after declaring that the want of mutuality in remedy constituted an insurmountable obstacle in the way of decreeing specific performance, added: 'The fact that Luse tendered to Deitz a deed in due form executed by himself and his wife does not affect the case. The objection still exists that Deitz could not have enforced performance against Luse, if Luse and his wife had been unwilling to convey. If a

party who is not bound to specifically perform may, by tendering performance, enforce a specific performance against the other party, he may, at his option, enforce the specific performance of any contract, though not bound to like performance himself.' I think it is thus made plain that the complainant must be denied relief in conformity to both principle and precedent."

It will be observed that the rule was applied in that case upon the express grounds that complainant on the application of the defendant could not be compelled by any court to specifically perform the contract, and the fact that complainant had tendered a deed signed by his wife did not alter the case.

We also call the court's attention to the case of *Putnam* v. *Grace,* 37 N. E. (Mass.), 166, 168. In this case the American Protective League held a lease from Grace for a term of twelve years, wherein it was provided that the premises were not to be underlet without the written consent of the lessor. The Protective League came into the hands of the plaintiff as receiver and the lease was sold by order of court to the defendants, Bradstreet and Bennett, but Grace's consent in writing was not obtained. This suit was brought by the receivers for specific performance of the contract of sale. The court said:

"What has heretofore been said relates to the construction of the contract, but there is another phase of the case, relating more especially to the remedy. If the form of the contract is such that the defendant has bound himself absolutely, but the plaintiff has

not bound himself, a court of equity is slow to lend its aid to enforce such a contract in favor of the party who is not bound. If, at the time of bringing his bill, the plaintiff was not bound to convey a court of equity will not ordinarily compel a defendant, under such circumstances, to accept a title. There must be a mutuality of obligation, or the court refuses to interfere. See 2 Beach. Mod. Eq. Jur. §§ 585-587; *Butman* v. *Porter,* 100 Mass. 337; *Marble Co.* v. *Ripley,* 10 Wall. 339, 359; *Wylson* v. *Dunn,* 34 Ch. Div. 569, 577, 578. The consent of Mr. Grace not having been obtained, there never was a moment prior to the filing of this bill when the plaintiff was bound to assign the lease to the defendants. If it had so happened that the defendants were willing to take their chances in respect to Grace, but the plaintiff wished not to assign the lease, the defendants could not have compelled him to do so. The provision, 'subject to obtaining the assent of Mr. Grace,' would protect him. Under such circumstances the plaintiff is not entitled to the assistance of a court of equity. It does not avail the plaintiff to say that Grace's consent may be compelled by a decree in this case. The question is, were the defendants bound, at the time of filing the bill, to accept the title? See *Ely* v. *McKay,* 12 Allen 323; Beach, Mod. Eq. Jur. § 585, and cases cited. For these reasons the demurrers must be sustained."

Many other cases could be cited by us in support of this rule, but we deem it unnecessary. The rule goes to the form of the contract, and if by the terms of the contract specific performance cannot be given to both parties thereto, it cannot be given to one of them. The con-

tract by its terms obligated appellee to convey the lease and to procure the consent of the Railway Company to such conveyance. It was therefore in form, such a contract as could not be specifically enforced.

III.

IT WAS NECESSARY UPON APPELLEE'S THEORY OF THE CASE, FOR IT TO OBTAIN THE WRITTEN CONSENT OF THE GREAT NORTHERN RAILWAY COMPANY TO AN ASSIGNMENT OF THE LEASE, BEFORE IT COULD MAINTAIN ANY CAUSE OF ACTION AGAINST APPELLANT.

Upon the trial of the case complainant made no showing, that it had procured and delivered to appellant the written consent of the Railroad Company to an assignment of the lease. On the contrary thereof, it was shown that no such assignment had been procured or tendered to the United States Gypsum Company. Mr. Knode testified, that appellant had not received any such consent either from appellee or from anyone else. (Rec., 144.)

The rule is stated in Fry on Specific Performance, Sec. 922, as follows:

> "With regard to the matters to be done by the plaintiff according to the terms of the contract, it is from obvious principles of justice incumbent on him when he seeks the performance of the contract to show, first, that he has performed or been ready and willing to perform the terms of the contract on his part to be then performed; and secondly, that he is ready and willing to do all matters and things on his

part thereafter to be done; and a default on his part in either of these respects furnishes a ground upon which the action may be resisted."

And in Pomeroy on Specific Performance, Sec. 323, it is said:

"It is the fundamental doctrine upon which the specific enforcement of contracts in equity depends that either of the parties seeking to obtain the equitable remedy against the other, must as a condition precedent to the existence of his remedial right show that he has done or offered to do or is then ready and willing to do all the essential and material acts required of him by the agreement at the time of commencing the suit, and also that he is ready and willing to do all such acts as shall be required of him in the specific execution of the contract according to its terms. * * * In accordance with this doctrine it is a familiar rule that the vendor as plaintiff cannot enforce a specific performance upon the purchaser unless he is able to give a good title to the subject matter which he has contracted to convey."

The same rule was laid down in *Electric Secret-Service Co.* v. *Gill-Alexander Elec. Mfg. Co.,* 28 S. W., 486; *Clark* v. *Hutzler,* 30 S. E., 470; *Cornell* v. *Andrus,* 36 N. J. Eq., 321; *Lindsey* v. *Humbrecht,* 162 Fed., 548, 555; and *Walsh* v. *Barton et al.,* 24 O. St., 28, 40.

The cause was submitted to the court upon such a record, and taken under advisement. The court held (Rec., 207), that it would not decree specific performance of the contract without the written consent of the Railroad Company to the lease of June 22, 1908, but in a most un-

usual manner, and, as far as we are able to determine, without precedent, stated in its opinion the following:

> "If, within thirty days, plaintiff secures the railway lessor's consent to the assignment or a discharge of the covenant and in all else is ready and able to perform, it shall have decree as prayed. Otherwise decree for defendant."

If our construction of the contract is right, and we think it is, that it lacked mutuality of remedy, it was not such a contract as could be specifically enforced. On the other hand, if appellee was entitled to specific performance by obtaining the written consent of the Railway Company, it was necessary for it to show, that it had obtained such consent before it could have any cause of action against appellant for specific performance. It was, under the circumstances, one of the essential and material acts required of appellee by the agreement at the time of the commencement of the suit, as stated in the authorities above cited. Without the written consent, the bill in specific performance was prematurely filed, and the obtaining of the consent, and tendering it to appellant after the bill was filed, and in fact after all the evidence was heard, could not cure the defect. Furthermore, the court could not extend the time of performance by appellee, or force a contract upon appellant, other than that as made.

The contract of June 15, 1909, provided for performance by appellee at the time the first payment became due thereunder, which, by the terms of the supplemental

agreements, was July 6, 1916. The court by its action in the premises extended the time for performance by appellee for more than one year and three months. By such action it held that although appellant had no right to the leasehold until appellee procured the written consent and delivered it, it could wipe out almost a year and a half of the lease, during a time when by the court's own conclusion, appellant had no right to take and operate the mill. The only reason offered by the court for so doing is found in the language of the opinion, that time was not of the essence of appellee's conveyance, for which it had a reasonable time. We recognize the rule, but we have found no case where complainants' right to file the bill was recognized before he had made or tendered the conveyance, nor has the rule any application where, by failing to convey, the buyer is held out of the premises, because of the right of a third party to refuse to permit him to occupy the same. By attempting to apply that rule to this situation, appellee could file a bill for specific performance at a time when appellant could not take possession of the property, and could thereby absolutely destroy and remove approximately one and a half years of the leasehold interest. We cannot agree with the trial court that such is the law, nor can it be said that after almost a year and a half of the term of the lease had elapsed, that appellee conveyed within a reasonable time.

IV.

THE PROCEEDINGS HAD SUBSEQUENT TO THE SUBMISSION OF THE CASE TO THE COURT WERE ERRONEOUS, NOR DID ANYTHING DONE THEREBY OVERCOME THE DEFECTS WHICH EXISTED AT THE TIME THE BILL OF COMPLAINT WAS FILED.

As shown above, the court found that appellee had failed to sustain its right to specific performance upon the trial of the cause, but in its opinion said, that if appellee would secure the consent of the Railway Company to an assignment of the lease or a discharge of the covenant within thirty days it would enter a decree as prayed in the bill of complaint. Following the statement made in the opinion, appellee presented to the court on September 4, 1917, an instrument in writing (Rec., 177) purporting to be the consent of the Great Northern Railway Company signed by R. I. Farrington, its second vice president. The instrument provided that the Great Northern Railway Company

> "does hereby consent to the subleasing of said premises by said lease to the United States Gypsum Company, its successors and assigns, and does likewise consent to the granting by said Mackey Wall Plaster Company to said Gypsum Company of an option to purchase all the rights of said Mackey Wall Plaster Company under and by virtue of said lease first above mentioned, and to the assignment of said lease first above mentioned by said Mackey Wall Plaster Company to said Gypsum Company, its successors and assigns, if the same shall be purchased pursuant to said option."

It was undated, without the seal of the company, and there was no showing, that it was signed by authority on behalf of the Great Northern Railway Company. Appellant objected to a decree upon any such showing, and the court thereupon rendered a memorandum opinion (Rec., 208), wherein it was stated:

> "Under the circumstances plaintiff will be allowed to supply defects, if it can, within thirty days. Title must meet the requirements of the law of specific performance, or not decreed";

following which appellee moved for permission to take certain depositions (Rec., 213) supported by an affidavit (Rec., 211), which depositions the court authorized, conditioned upon giving appellant five days' notice of the time and place of taking the same. This action was in express violation of *Rule* 47 *of "Rules of Practice in Equity"* prescribed by the Supreme Court, as follows:

> "The court upon application of either party, when allowed by statute or for good and exceptional cause for departing from the general rule to be shown by affidavit, may permit the deposition of named witnesses * * *. Those of the plaintiff within sixty days from the time the cause is at issue, those of the defendant within thirty days from the expiration of the time for the filing of plaintiff's depositions, and rebutting depositions by either party within twenty days after the time for taking original depositions expires."

There was no order entered reopening the cause for further evidence, nor was the time extended for taking further evidence by the parties, and there was no show-

ing "of good and exceptional cause for departing from the general rule," that the evidence should be taken in open court. The only reason offered for taking the depositions was, that it had become necessary, and that the persons whose depositions were sought resided at St. Paul in the State of Minnesota. Objection was made on behalf of appellant to the entry of the order, to the taking of the depositions, and to receiving the same in evidence (Rec., 184) because violative of the rules of practice in equity. If these rules mean anything they should be enforced.

The depositions of Robert I. Farrington and L. E. Katzenbach were taken pursuant to the order above mentioned. Mr. Farrington testified, that he was a director and second vice president of the Great Northern Railway Company throughout the month of June, 1909; that he was elected a director of the company April 20, 1901, and served continuously as such until May 27, 1912; that he signed Plaintiff's Exhibit "A" being the consent above mentioned. (Rec., 185-186.) But it did not appear when he signed it, and the instrument itself was without date. By the deposition of Mr. Katzenbach the witness was allowed to testify to the contents of the records of the Railway Company, showing the election of Mr. Farrington as an officer of the company, and his authority as such officer as prescribed by the by-laws of the company. The evidence was objected to on the ground that it was incompetent. (Rec., 186-187.) The only competent evidence of the facts sought to be shown

by Mr. Katzenbach were the records thereof and that such records were properly kept. The testimony of a witness, who said he had no personal knowledge of the records preceding the date of his employment in January, 1912 (Rec., 192) could not be competent to prove the records of the corporation, much less their contents, during a period when the witness had no knowledge thereof. It was not necessary to object to such evidence at the time the deposition was taken, since the objection did not go to the form of the proof, but to the competency of the evidence. And aside from the question of receiving the evidence, it offered no legal proof of the facts sought to be established thereby. It follows, that by these depositions appellee, failed to prove the authority of Farrington to sign the instrument in question; failed to prove, that the consent was signed by Farrington when he was vice president, as they did not show upon what date it was signed; and failed to prove any delivery of the said instrument, since there was no evidence therein of delivery by the Railway Company.

When the depositions were returned to court appellee was permitted, over the objection of appellant, to offer further evidence. R. J. Reynolds testified that he was a clerk in the legal department of the Great Northern Railway Company in the office of Veazie & Veazie at Great Falls, Montana; that they were division counsel for said railway; that at the dictation of Mr. I. Parker Veazie, Sr., he prepared the consent "Exhibit A," being the instrument signed by R. I. Farrington.

(Rec., 193-194.) He said he mailed the original and duplicate to the general traffic manager at St. Paul, Minnesota, and received a reply dated June 12, 1909, prior to the execution of the lease and option between the Mackey Wall Plaster Company and the United States Gypsum Company, in which reply it was stated (Rec., 196-197):

> "I enclose herewith copy of this document duly executed by the Great Northern Railway and have sent the other copy of same to Mr. Avery, president of the Gypsum Company, at Chicago."

Not only was this evidence taken in violation of the rules of practice in equity, but it was incompetent to prove delivery of the instrument to the United States Gypsum Company if it is claimed that delivery was shown thereby. The letter of June 12th could not bind the United States Gypsum Company, nor could the delivery of the written consent to Veazie & Veazie, counsel for the Railway Company, constitute delivery of the instrument. It is true the letter says that a copy of the instrument was sent to Mr. Avery. There was no letter to Mr. Avery, or copy of a letter, showing that it was in fact sent, nor could such a statement bind appellant, nor was it competent evidence or legal proof of the fact. The record, therefore, contains no proof, that the consent was delivered to the United States Gypsum Company.

The further deposition of Mr. Hoover shows that the consent was received by Veazie & Veazie, found in their

file, and had never been delivered. The delivery of the instrument, according to the testimony of the witness Hoover, was made to the Mackey Wall Plaster Company, and took place on August 27, 1917, as follows (Rec., 198):

> "After a conversation with Mr. Veazie he went to his private files and produced a file concerning the matter between the United States Gypsum Company and the Mackey Wall Plaster Company. He produced from the file and handed to me the consent, 'Plaintiff's Exhibit A,' which is attached to Mr. Farrington's deposition, and stated that the consent had been given long prior to this time *for the purpose of being delivered to the Mackey Wall Plaster Company and that he would then deliver it.*"

It may be contended by appellee, that the record shows that Veazie & Veazie were also attorneys for the United States Gypsum Company. But the record is clear, that they were only attorneys for it in the matter of preparing the lease and option (Rec., 194) and that they were acting in their capacity as counsel for the railroad in obtaining the consent, is shown by the statement that they received it to deliver the same to the Mackey Wall Plaster Company, and undertook to deliver it to Mr. Hoover as attorney for that company. They could not have been acting for appellant under these circumstances.

We contend that it was too late to bind the railway company by the delivery of a consent, signed by a man who did not then hold any office with the Railway Company,

and which had remained undelivered from the time of its receipt until the date last above mentioned. The authority of Veasie & Veasie to deliver the instrument was not shown, nor was it shown that the Railway Company consented to be bound thereby. The original option had long since expired, and a new contract had been made on July 6, 1915. Such a delivery could not under any circumstances bind the Great Northern Railway Company. We do not think that a court of equity should compel appellant to take a title based upon such a flimsy foundation.

It has frequently been held, that a court will not force upon the vendee in specific performance a title which will compel him to defend it in the courts. Is it possible that any lawyer would pass the title of the lease in question to the United States Gypsum Company based upon an instrument signed by a vice president of the company, undated and without seal, and delivered at a date many years after the original option expired and subsequent to the time when such vice president ceased to have any connection with the Railway Company? It would, indeed, place appellant in a difficult position, if the Railway Company should claim, that the consent so delivered by Veazie & Veazie was not binding upon it.

In *Stapylton* v. *Scott,* 33 Eng. Rep. (Full Rep.), 988, the court said:

> "The course has, however, varied entirely and it has been held repeatedly that though in the judgment of the court the better opinion is that a title can be made, yet if there is a considerable, a rational

doubt, the court has not attached so much credit to its own opinion as to compel a purchaser to take the title, but leaves the parties to law. The first modern case of that sort was, I believe, *Shapland* v. *Smith;* (1) in which Mr. Hett differed from Baron Eyre; and the opinion of the former was confirmed by Lord Thurlow; who however felt the doubt so forcibly, that he refused a specific performance; and unquestionably in many instances since that time it has been refused where there was reasonable doubt upon the title.

* * * Admitting it may be explained by extrinsic circumstances, that the testator's doubt can be accounted for, the true question is, whether this is a reasonably clear, marketable, title, without that doubt as to the evidence of it, which must always create difficulty in parting with it. I am satisfied, that it is not."

In *Sloper* v. *Fish,* 35 Eng. Rep. (Full Rep.), 274, 276, in a bill for specific performance it appeared that the title was subject to a judgment debt.

"Then it would be a question between them and the judgment creditor, whether, as against their lien, the judgment would be operative, and supposing it would not, what would hinder it from attaching on the estate subject to the lien? Without absolutely deciding each of these questions it is sufficient to say that there is so much of doubt upon them, that the court will not compel a purchaser to run the hazard of their decision.

It has been said, that every title is good, or bad, and the court ought to know nothing of a doubtful title, but the court has adopted a different principle of decision. * * * Therefore, as I shall not compel

this purchaser to take the title, the bill must be dismissed."

In *Lindsey et al.* v. *Humbrecht,* 162 Fed., 548, 555, the court said:

> "Notwithstanding this, it seems clear that in a proceeding like this, for specific performance, it would be necessary for the complainants to show that they had a good title to the land, and would be able to convey the same to Humbrecht; that is a 'marketable title' as it is frequently called in the books. The title should be such as not only to enable the purchaser to hold the land without question, but to sell it without difficulty if he desires."

In the case of *McCroskey* v. *Ladd et al.,* 28 Pac. (Sup. Ct. Cal.), 216, 217, plaintiff sought to compel defendants to accept a title resting on adverse possession. The flaw in the paper title consisting in the lack of proper averments, and of corporate seal, in a deed purporting to be executed by a corporation, the court said:

> "In the cases of this kind, a title, to be good, must be one which is 'free from litigation, palpable defects, and grave doubts; should consist of both legal and equitable titles; and should be fairly deducible of record.' *Turner* v. *McDonald,* 76 Cal. 180, 18 Pac. Rep. 262. The question as to whether or not the vendor has acquired a perfect title by adverse possession is not to be considered. The purchaser is entitled to a good paper title, sufficient in law, 'and was not bound to accept title resting upon the statute of limitations, or take the risk of determining from facts which he might learn *dehors* the record whether or not the statute of limitations could be suc-

cessfully pleaded against the adverse claim.' *Benson* v. *Shotwell,* 87 Cal. 56, 25 Pac. Rep. 249."

The case of *Herman* v. *Somers et al.,* 27 Atl. (Sup. Ct. Pa.), 1050, 1051, the court said:

"In equity a marketable title is one in which there is no doubt involved, either as to matter of law or fact. *Dalzell* v. *Crawford,* Pars. Eq. Cas., 45; *Nicol* v. *Carr,* 35 Pa. St. 382; *Swayne* v. *Lyon,* 67 Pa. St. 439. In *Speakman* v. *Forepaugh,* 44 Pa. St. 373, it was said: 'Every title is doubtful which invites or exposes the party holding it to litigation. If there be color of outstanding title, which may prove substantial—though there is not enough in evidence to enable the chancellor to say so—a purchaser will not be held to take it, and encounter the hazard of litigation.' The testimony in this case is quite sufficient to bring it within the principle recognized in these cases. * * *"

In the case of *Fisher* v. *Eggert,* 64 Atl., 957, 958, the court said:

"I am unable to advise a decree of specific performance in this cause because of reasonable doubts which, in my opinion, exist touching the title of complainant. This court has uniformly refused to decree specific performance by a purchaser in all cases where the title of vendor cannot with certainty be pronounced free from doubts. (Cases cited.) The cases here cited proceed upon the view that where all parties interested in a title are not before the court, and consequently are not bound by the decision, a decree of specific performance should not be made if the character of the title be doubtful, even though the court might be able to come to the con-

clusion that a title could be made by vendor that would not probably be overthrown; that if a title is to be forced upon a purchaser against his will it should be a title that will enable him not only to hold the land, but to hold it in peace, and to sell it with reasonable certainty that no flaw or doubt will disturb its marketability. In *Cornell* v. *Andrews,* 35 N. J. Eq. 7, 12, it is said: 'The real question to be decided in this case is whether the title which the complaint offers is a marketable one. If it is such a title as would be questionable, the court ought not to force it on the unwilling purchaser, even though in its opinion, it would, on litigation, be sustained.' ''

In the case of *Daniel* v. *Shaw,* 44 N. E. (Sup. Ct., Mass.), 991, a bill was brought by plaintiff for the specific enforcement of a contract for the purchase of real estate. The relief sought was denied. The facts appear in the opinion set out below:

''The defendant contends that the plaintiff is not able to offer him a good title, by reason of the provisions of St. 1891, c. 323, as amended by St. 1892, c. 418, and the acts of the board of survey of the City of Boston thereunder. The plaintiff concedes that his title is not good if the statute is constitutional. The parties also differ in their construction of the statute. The City of Boston is interested in both of these questions. It has been allowed to file a brief, but it is not a party to the record, and would not be precluded from litigating the same questions anew if our decision in the present case were for the plaintiff. The defendant would be exposed to the chance of such litigation if compelled to accept the title now offered. By the concession of the plaintiff,

the statute, if constitutional, creates an incumbrance on his title. The plaintiff asks us to declare his title good by declaring the statute unconstitutional. The defendant ought not to be compelled to accept such a title. (Cases cited.)"

In *Fleming* v. *Burnham,* 100 N. Y., 1, 9, the court said:

"But the question presented to the court on an application to compel a purchaser on a judicial sale, who raises objections to the title tendered, to complete the purchase, is not the same as if it was raised in a direct proceeding between the very parties to the right. Where all the parties in interest are before the court, and the court has jurisdiction to decide, they are concluded by the judgment pronounced, so long as it stands unreversed. * * * But the court stands in quite a different attitude where it is called upon to compel a purchaser to take title under a judicial sale, who asserts that there are outstanding rights and interests not cut off or concluded by the judgment under which the sale was made. The objection may involve a mere question of fact, or it may involve a pure question of law upon undisputed facts. In either case it may very well happen that the question is so doubtful that, although the court would decide it upon the facts disclosed, in a proceeding where all the parties interested were before the court, nevertheless it would decline to pass upon it in a proceeding to compel a purchaser to take title, and would relieve him from his purchase. The reason is obvious. The purchaser is entitled to a marketable title. A title open to a reasonable doubt is not a marketable title. The court cannot make it such by passing upon an objection depending on a disputed question of fact, or a doubtful question of

law, in the absence of the party in whom the outstanding right was vested. He would not be bound by the adjudication, and could raise the same question in a new proceeding."

Wesley v. *Eells,* 177 U. S., 370, 376, was a suit for specific performance of a contract to purchase real estate. The court therein said:

"In *Hennessy* v. *Woolworth,* 128 U. S. 438, 442, this court said: 'Specific performance is not of absolute right. It rests entirely in judicial discretion, exercised, it is true, according to the settled principles of equity, and not arbitrarily or capriciously, yet always with reference to the facts of the particular case.' * * *

Again, it is a settled rule of equity that the defendant in a suit brought for the specific performance of an executory contract will not be compelled to take a title about which doubt may reasonably exist or which may expose him to litigation. *Morgan's Heirs* v. *Morgan,* 2 Wheat. 290, 299, 301; *City of Tiffin* v. *Shawhan,* 43 Ohio St. 178, 183. And, speaking generally, a title is to be deemed doubtful where a court of co-ordinate jurisdiction has decided adversely to it or to the principles on which it rests. *Fry on Specific Performance,* 3d ed. Sec. 870, and authorities there cited. One of the grounds upon which a decree for specific performance was denied in *Hepburn* v. *Auld,* 2 Cranch, 262, 278, was that it would impose upon the defendant the necessity of bringing a suit to perfect his title.

The principle is well illustrated in *Jeffries* v. *Jeffries,* 117 Mass. 184, 187, which was a suit for the specific performance of a written agreement for the purchase of certain real estate. One of the objec-

tions to the title was that it was incumbered by conditions that would interfere with the enjoyment of the property. The Supreme Judicial Court of Massachusetts there said: 'Hence the propriety and the necessity of the rule in equity that a defendant, in proceedings for specific performance, shall not be compelled to accept a title in the least degree doubtful. It is not necessary that he should satisfy the court that the title is defective so that he ought to prevail at law; it is enough if it appear to be subject to adverse claims which are of such a nature as may reasonably be expected to expose the purchaser to controversy to maintain his title, or rights incident to it. *Richmond* v. *Gray,* 3 Allen 25; *Sturtevant* v. *Jaques,* 14 Allen 523; *Hayes* v. *Harmony Grove Cemetery,* 108 Mass. 400. He ought not to be subjected, against his agreement or consent, to the necessity of litigation to remove even that which is only a cloud upon his title.' So in *Lowry* v. *Muldrow,* 8 Rich. Eq. 241, 247, the court said that on bills for specific performance of contracts concerning lands, 'courts of equity do not force the purchasers to take anything but a good title, and do not compel them to buy lawsuits.' Numerous other American cases announce the same rule.''

In this case appellee by doubtful evidence has sought to establish the execution and delivery, as binding upon the Great Northern Railway Company, of the consent in question. The Great Northern Railway Company was not a party to this suit and was not bound by anything held as to the consent. Any consent, short of the present acknowledged act of the Railway Company, ought not to be accepted in satisfaction of the rule requiring a title

free from question. Why did appellee try its case first without any consent, second without obtaining a present acknowledged consent, and third without any evidence by any official of the road that the consent produced was ratified and approved? The evidence of the unqualified consent of the Railway Company, if it did consent, was available, and in an action for specific performance, appellee should not be allowed to offer a title subject to question, when evidence to free the title from question was in fact available. No lawyer would accept the title offered, under these circumstances.

In conclusion, we direct attention to the fact that the trial court not only held that the consent introduced by appellee was sufficient, but assessed interest against appellant as of date of July 6, 1916, at the rate of 8 per cent. on the cash installment and 5 per cent. upon said notes. If appellee was not entitled to a decree at the time the bill was filed and the case originally tried, because it had not tendered a sufficient conveyance, no interest should have been charged against appellant. The contract provided, that the first installment of the purchase price was to be paid and the notes executed at the time appellee conveyed the premises to appellant. As shown, there could be no transfer of the lease without the written consent of the Railway Company, and until it was obtained and tendered to appellant no interest could accrue upon the purchase price of the premises. It was error for the court to assess

interest against appellant on July 6, 1916, and to direct the execution of said notes to be dated July 6, 1916.

Respectfully submitted,

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